LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 21 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

70-311

No. ~~1856~~

HAROLD R. SWENSON, Warden, Missouri State Penitentiary,
Petitioner,

vs.

BERT LEROY HUNTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN C. DANFORTH
Attorney General of Missouri

GENE E. VOIGTS
Assistant Attorney General

KENNETH M. ROMINES
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

Opinions Below 2

Jurisdictional Statement 2

Question Presented 3

Statutory Provisions Involved 3

Statement 6

Argument--

The Circuit Court below incorrectly applied *Procunier* v. *Atchley*, 27 L.Ed.2d 524, by remanding the case to the District Court for an Evidentiary hearing, when, after two evidentiary hearings in the State Courts the Federal District Court did not order an evidentiary hearing pursuant to Section 2254, Title 28, U.S.C., as to the voluntariness of the confession involved 11

Appendix A—Opinion of the Supreme Court of Missouri A1

Appendix B—Opinion and Order of the United States District Court for the Western District of Missouri A21

Appendix C—Opinion of the United States Court of Appeals for the Eighth Circuit A30

Appendix D—Amended Opinion and Order of the United States Court of Appeals for the Eighth Circuit A47

TABLE OF CASES

Hunter v. *Swenson*, ... F.Supp ....., No. 18-635-2, September 9th, 1970 2

Hunter v. *Swenson*, ... F.2d ....., No. 20-601, April 26, 1971 2

Jackson v. *Denno*, 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774, 1 A.L.R.3d 1205 ..... 10, 12, 14, 16

Procunier v. *Atchley*, ... U.S. ....., 27 L.Ed.2d 524, 91 S.Ct. ..... (1971) 3, 10, 16, 17,
State v. *Hunter*, (Mo.Sup. 1969) 456 S.W.2d 314 ..... 2, 6
Townsend v. *Sain*, 372 U.S. 293 (1963) 6
Walker v. *Bishop*, (8th Cir.) 408 F.2d 1378 17

STATUTORY CITATIONS

Title 28, U.S.C.A., Section 1254 2
Title 28, U.S.C.A., Section 1291 3
Title 28, U.S.C.A., Section 2101 2
Title 28, U.S.C.A., Section 2253 3
Title 28, U.S.C.A., Section 2254 ..... 2, 4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

HAROLD R. SWENSON, Warden, Missouri
State Penitentiary,
Petitioner,

vs.

BERT LEROY HUNTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Comes now your petitioner, Harold R. Swenson, Missouri State Penitentiary for Men at Jefferson City, Missouri, and through his Attorney of Record, seeks a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit and would state and allege in the following particulars, to-wit:

OPINIONS BELOW

That the Opinion of the Supreme Court of Missouri is cited as *State* v. *Hunter*, (Mo.Sup. 1969) 456 S.W.2d 314, and is appended hereto as Appendix A. That the Opinion of the United States District Court for the Western District of Missouri, not yet reported, is cited as *Hunter* v. *Swenson*, ... F.Supp. ....., No. 18,635-2, September 9th, 1970, and is appended hereto as Appendix B. That the Opinion of the United States Court of Appeals, not yet reported, is cited as *Hunter* v. *Swenson*, ... F.2d ....., No. 20,601, April 26th, 1971, and is appended hereto as Appendix C. A Motion for Rehearing or Transfer to the Eighth Circuit En banc, was denied on May 21st, 1971, and Amended Opinion was filed on that date, and is appended hereto as Appendix D.

JURISDICTIONAL STATEMENT

That the petitioner filed a Petition for Writ of Habeas Corpus pursuant to Title 28, Section 2254, U.S.C.A., in the United States District Court for the Western District of Missouri, Western Division. That from the denial of that Court of granting of the writ, the respondent appealed to the United States Court of Appeals for the Eighth Circuit, which by its opinion filed on April 26th, 1971, remanded the cause to the District Court for an evidentiary hearing.

Jurisdiction is conferred upon this Court by the provisions of Section 1254, Title 28, U.S.C.A., and this petition is sought within ninety (90) days from the filing of the opinion below and is, therefore, timely under the provisions of Section 2101, Title 28, U.S.C.A.

QUESTION PRESENTED

Did the Eighth Circuit Court below correctly apply *Procunier* v. *Atchley*, ... U.S. ....., 27 L.Ed.2d 524, 91 S.Ct. ..... (1971), by remanding the case to the District Court for an evidentiary hearing, when, after two evidentiary hearings in the State courts, the Federal District Court did not order an evidentiary hearing pursuant to Section 2254, Title 28, U.S.C.A.?

STATUTORY PROVISIONS INVOLVED

Title 28, U.S.C.A., Section 1291, provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. . . ."

Title 28, U.S.C.A., Section 2253, provides:

> "In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> "There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> "An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause. . . ."

Title 28, U.S.C.A., Section 2254, provides:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof where parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support

such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

STATEMENT

Petitioner is presently confined at the Missouri State Penitentiary at Jefferson City, Missouri, and the facts, as found by the Missouri Supreme Court in *State* v. *Hunter*, (Mo.Sup. Div. 1) 456 S.W.2d 314, and accepted by the District Court below as facts having been reliably found consistent with *Townsend* v. *Sain*, 372 U.S. 293 (1963), would appear to be as follows:

The defendant was found guilty of first degree murder in the killing of John Munsford Lyle. There was no direct

evidence linking the defendant to the killing, except for his confession, and the admissibility of the confession was the only issue briefed and argued before the Missouri Supreme Court.

Lyle was found dead in his tavern in Amazonia, Andrew County, Missouri, with two bullet wounds in his head which would have caused death within a matter of minutes (Tr. 17). A cash drawer was open (Tr. 7), and a change box with money was missing (Tr. 11).

The appellant, 22 years of age at the time of trial (Tr. 54), admitted that he had served time in the Missouri State Penitentiary, and further admitted to being more familiar with the criminal law and its processes than the average person (Tr. 83-84). The evidence would tend to prove that the appellant was questioned several times about the Lyle murder by Sgt. Shirley of the Missouri State Highway Patrol, on each occasion being advised of his rights, which were read to him from a card which Sgt. Shirley carried with him (Tr. 28, 100; State's Exhibit 4).

The appellant was arrested by Kansas police in Atchison, Kansas, during the early morning hours of June 18, 1968 and was questioned briefly at police headquarters by Sgt. Rhodes of the Missouri State Highway Patrol (Tr. 55-57), but was not maintained in custody because of appellant's promise to appear at the headquarters of Troop H of the Missouri State Highway Patrol at St. Joseph, Missouri (Tr. 140). On the 19th or 20th of June, 1968, appellant appeared at Troop H Headquarters in St. Joseph, Missouri and was questioned by Sgt. Shirley.

On July 15th and July 16th, the appellant was questioned by Missouri Highway Patrol Officers at the request of the Prosecuting Attorney of Andrew County, Missouri. No written statement was obtained on either occasion (Tr.

42). Sgt. Shirley and Trooper Noyes were present on the 15th, and were present on the 16th together with Lois Sowards, a Stenographer (Tr. 33), who made shorthand notes for her own use of some of the conversations, and testified in Court from these notes (Tr. 34). Each of these interviews lasted approximately two hours (Tr. 36, 101, 160). The Officers told the appellant that another individual had made a partial statement about the Lyle killing, implicating the defendant (Tr. 31k, 66, 89), at which time appellant indicated knowledge of the incident but denied having been at the tavern (Tr. 154). Mrs. Sowards testified that the appellant was advised of his rights prior to the questioning on July 16th and said that he understood them (Tr. 36), and Mrs. Sowards further testified she heard no promises of leniency made, or offers of help by the Officers.

The appellant made oral statements on July 15th and July 16th, but declined to make a written statement, telling Officer Shirley on July 16th (Tr. 102):

> "If you try to use [the oral statements] in Court, I will say you didn't advise me of my rights. . . .
>
> "I will also turn up two witnesses, one of whom is a Reverend. They will believe me and they will not believe you. . . .
>
> "If they should not believe me, I will go to a psychiatrist and have myself declared mentally incompetent. . . ."

Officer Shirley also testified (Tr. 103):

> ". . . He made other statements saying I was going to offer him a deal and at this time I advised him I had no more right to offer a deal than I would of filing a charge. That is not my position. . . .
>
> "Mr. Hunter requested on several occasions that I attempt to confer with the prosecuting attorney regard-

ing having the charges reduced, and I told him at the time I would talk to the prosecuting attorney, that at no time did I make any promises to him. . . .

"Mr. Hunter also requested Mr. Lance contact him personally at the jail. This information was related to Mr. Lance but I didn't relay any information back to him, but whether I told him that Mr. Lance told me that when Mr. Lance was satisfied he would cooperate and give a truthful statement, at that time he would consider coming to Atchison."

As has been said, the July 15th and July 16th interviews closed without the defendant having made a written statement. There was no objection at trial to the receipt into evidence of the oral statements the appellant made on these occasions.

The next contact, and the contact which the Circuit Court below finds determinative, with the appellant came on August 5th, 1968, when Sgt. Shirley and Sgt. Rhodes of the Missouri Highway Patrol went to Atchison at the appellant's request (Tr. 31f, 104). The Transcript indicates (Tr. 47), that Mrs. Sowards, a Court Stenographer, went with the Officers.

Sgt. Rhodes read the appellant a statement of his constitutional rights, then handed him the card on which the rights were written, and the appellant himself read his rights (Tr. 31k; 34, Exhibit 3, page 1), and appellant acknowledged that he understood his rights (Tr. 34, Exhibit 3, page 1). The appellant signed a written acknowledgment and waiver, dated August 5th, 1968 (State's Exhibit 2, Tr. 31j). Sgt. Shirley then questioned the appellant, with the questions and answers being taken down by the Stenographer. No threats or promises were made to appellant on August 5th, 1968 (Tr. 35-36, 45, 47-48, 168), and the signed statement recites from the first page and on the

last page that no threats or promises were made. This session lasted approximately four hours (Tr. 108), with Officers Shirley, and Rhodes and Mrs. Sowards and the appellant being present during the entire period. Officer Shirley testified as to this statement as follows (Tr. 113):

> "I asked Mr. Hunter what he thought would happen when the statement was typed and brought back, in the event that the Andrew County Prosecuting Attorney felt that [he had] to file a first degree murder, and he said to me at that time, as I related last night, practically the same thing. That he would state that I had not informed him of his rights . . . and then he reiterated the fact that he had two witnesses, one of which was a Reverend . . . and again he said he would have himself declared mentally incompetent. . . ."

ARGUMENT

The Circuit Court below incorrectly applied Procunier v. Atchley, 27 L.Ed.2d 524, by remanding the case to the District Court for an evidentiary hearing, when, after two evidentiary hearings in the State Courts the Federal District Court did not order an evidentiary hearing pursuant to Section 2254, Title 28, U.S.C., as to the voluntariness of the confession involved.

This case involves the correct application by the Circuit Court of Appeals for the Eighth Circuit of this Court's opinion in *Procunier* v. *Atchley,* ..... U.S. ....., 27 L.Ed.2d 524, 91 S.Ct.,....., and necessarily includes a determination to be made as to the correct procedures in finding a confession voluntary pursuant to *Jackson* v. *Denno,* 378 U.S. 368, 12 L.Ed.2d 908, 84 S.Ct. 1774, 1 A.L.R.3d 1205. By reference to the opinion of the Eighth Circuit, attached hereto as Appendix C, it can be seen that that Court remanded for an evidentiary hearing a habeas corpus case which had been denied by the District Court for the Western District of Missouri without an evidentiary hearing. The stated bases on which this case was remanded by the Eighth Circuit is set out at page 12 of the opinion as follows:

> "Having carefully scrutinized the state court records and for reasons already mentioned, this Court believes that Sgt. Shirley's discussion with Hunter concerning a possible lesser charge on August 5, 1968 was a material and relevant fact which, because of the omission of Sgt. Rhodes' testimony at the state court trial of Hunter, was not adequately developed. In determining that there was no discussion of the so-called 'deal' on August 5, 1968, the State Supreme Court appears to have made an incorrect fact determination that could have influenced its primary decision that Hunter's confession was voluntary. Therefore, in ac-

cordance with 28 U.S.C. § 2254 (b) (3) and (8) and *Townsend*, an evidentiary hearing on the allegations contained in Hunter's petition is mandatory."

The testimony referred to by Circuit Judge Ross in his above set out finding, is found in footnote 3 of the Circuit Court's Opinion, at pages 6 and 7.

This petitioner would submit that the Circuit Court in this instance, not unlike the District Court in *Procunier*, has not held that the confession was involuntary, but has concluded that the applicant was entitled to a further evidentiary hearing because "material and relevant facts" were omitted at the State court trial of the applicant. Petitioner would submit that in this finding the Eighth Circuit is in error.

As the Circuit Court points out in its opinion, the applicant in this instance filed a motion to suppress the confession, a hearing was had, in which all parties involved at the giving of the confession testified, and the State Circuit Court, by Judge Yeaman, specifically held that the confession, and all oral statements of applicant, were voluntarily given and admissible into evidence. Additionally, in compliance with *Jackson* v. *Denno*, a hearing concerning the voluntariness of applicant's confession was had outside the presence of the jury at the close of which the trial court, by Judge Schoenlaub, again held the confession, and oral statements, to have been voluntarily given and "that they were not procured by coercion or threats or through fear, were not induced by promises of leniency." (Footnote 3, dissenting opinion, Eighth Circuit).

It is this hearing, and the testimony involved, on which the majority opinion of the Eighth Circuit relies for its remand to the District Court. The majority opinion concerns itself with testimony given by an officer of the Missouri State Highway Patrol, Sgt. Rhodes, at the hear-

ing on the motion to suppress, which was adduced by way of stipulation at the hearing outside the presence of the jury during the trial. This testimony was as follows:

"Q. Sgt. Rhodes, more specifically, did you ever talk to Mr. Hunter at the Atchison County Jail in Kansas?

A. Oh, yes. Pardon me. On August 5th.

Q. How about prior to August 5th, you accompanied Sgt. Shirley down there on any prior trips that he had made to Atchison to talk to Mr. Hunter?

A. No....

Q. Sgt. Shirley, in the course of your direct testimony where you were being about whether any promises of leniency had been made to Mr. Hunter, you made reference to its [sic] possible', and that's where you left, would you explain that for me?

A. All I am aware of, Sgt. Shirley, Mrs. Sowards and myself and Bert Hunter were in the room in the Atchison County—pardon me, the sheriff's office in Atchison, Kansas, and Sgt. Shirley made a statement similar to 'Mr. Lance said its possible'. Now, this is all I know of.

Q. Do you know what he was referring to at that time, what Sgt. Shirley was referring to?

A. No, sir.

Q. You don't know what prompted that statement from Sgt. Shirley to Mr. Hunter?

A. *Well, can I say what I think prompted it? I don't know. I don't know what prompted it.*

Q. I am asking you if you know what prompted it?

A. *No, actually not.*

Q. Did you know what Sgt. Shirley was talking about?

A. I thought I did, yes.

Q. Tell me what you thought he was talking about.

A. Well, if Bert would give/if Bert Hunter were to give a statement where he would be testifying against Carl Paxton as to Mr. Lyle's death, then there might be some leniency shown to Bert Hunter by the prose-

cuting attorney. This is what Bert Hunter wanted you might say, leniency if he were to testify.

Q. This is your understanding and your impression then from that conversation, or from that statement by Sgt. Shirley to Mr. Hunter?

A. That this was a message, 'its possible'.

Q. A message from whom, Sgt. Rhodes?

A. Well, see I don't know. Sgt. Shirley was telling Bert 'its possible'. Do you mean do I know who it was from?

Q. Yes?

A. No, sir

Q. Did Sgt. Shirley say he was relaying it from someone?

A. *Well, Sgt. Shirley, as I recall, I would have thought it was a relay from Mr. Lance on this.*

Q. To Mr. Hunter?

A. Yes, Sir.

Q. Sgt. Rhodes, this conversation, was it before or after Mr. Hunter signed the waiver, I believe which has been marked Exhibit 1? Yes, State's Exhibit 1.

A. I would say that it was part of this statement." (Emphasis added).

The majority opinion of the Eighth Circuit relies on the foregoing transcript references, at pages 6-7, of its opinion, to find that the District Court below, the Supreme Court of Missouri, and the State trial court, did not adequately develop this relevant fact, in light of the failure of the testimony of Sgt. Rhodes to be introduced at the trial during the *Jackson* v. *Denno* hearing. Again, this petitioner would suggest that the Eighth Circuit has made the same error that the District Court made in *Procunier*, by its holding that it has found "relevant and crucial evidence" excluded on the issue of voluntariness and thus the decisions of the District Court, State Supreme Court, and the State trial court to have been unreliably deter-

mined. This petitioner would suggest that in fact the very testimony which concerns the Eighth Circuit was before the Circuit of Missouri by way of a motion to suppress, was heard, and the confession found voluntary. As the dissenting opinion of the Circuit Court below notes, at pages 16-17:

> "I fail to see the value of another evidentiary hearing on the issue of voluntariness. This matter was originally gone into in the preliminary hearing on October 2, 1968. It was thoroughly ventilated in the hearing on the motion to suppress heard on March 11, 1969. Transcripts of the foregoing were available to appellant and his counsel at the time of the trial. Appellant stipulated that the transcript of Sgt. Shirley's testimony given in the hearing on the motion to suppress be made a part of the record on the issue of voluntariness. Sgt. Shirley was also available and did testify briefly, and was available for cross-examination by the defendant. A transcript of Sgt. Rhoades' testimony given during the hearing on the motion to suppress was likewise available to defendant and his counsel. Sgt. Rhoades had testified that he heard Sgt. Shirley say 'its possible.' On cross-examination he stated he thought this meant there might be some leniency shown to defendant by the Prosecuting Attorney if the defendant were to give a statement. He also volunteered that 'its possible' may have related to the prosecuting attorney coming down to see the defendant. Neither side chose to call Sgt. Rhoades or use the transcript of his testimony. After the trial court's determination of voluntariness, appellant's statements were admitted. Thereafter, the jury was properly instructed that before the jury could consider an alleged statement of the defendant, oral or written, it must have been made voluntarily."

This case does not involve an attack by an applicant for habeas corpus that the procedure used to determine the voluntariness of his confession was improper under

Jackson v. *Denno*. Likewise, there are no "substantial facts" in dispute. Unlike the restricted hearing in *Procunier*, the hearing in this case which was had was unrestricted, and there have been in fact two state hearings as to the voluntariness of the confession. Thus, here the habeas applicant can point to no shortcomings in the procedure used to determine voluntariness. The state courts admittedly have applied, and applied correctly, relevant federal standards as to the voluntariness of a confession. This petitioner's reading of *Procunier* is that an applicant must show that his facts, being those facts not *considered* by the state fact finder, if true require the legal conclusion that applicant's confession was involuntary. As has been demonstrated above, all facts which could be marshalled have been presented to state trial courts in Missouri, to the Supreme Court of Missouri, and to the Federal District Court sitting in habeas. As the District Court below stated as to this issue:

> "There was no definite promise to Hunter, only a statement that a lesser charge might be considered. Hunter did not immediately act upon that statement In fact, it was almost three weeks later before he made any incriminating statements. At the time he did make a confession, there was no discussion of a 'deal' Further, on the first and last pages of his written statement, Hunter acknowledged that no promises had been made to him. . .
>
> "It seems apparent to this court that Hunter did not believe a deal had been made at the time he made his confession, since he was attempting to make a 'deal' for reduced charges two weeks after the confession. It is obvious that he hoped by confessing that charges would be reduced. This is not the case were his will to resist was overborne by a promise of leniency. Hunter exercised his independent judgment in con-

fessing, and in the totality of circumstances, his confession was voluntary and therefore admissible against him."

(Pages 8-9, Opinion of the District Court)

This petitioner would submit that in essence the majority opinion of the Circuit Court below has tested the credibility of witnesses, which is admittedly not the function of the Eighth Circuit Court of Appeals sitting in habeas corpus, *Walker* v. *Bishop,* (8th Cir.) 408 F.2d 1378; and *Gerberding* v. *State,* (8th Cir.) 426 F.2d 247, and as a consequence thereof has incorrectly applied *Procunier* v. *Atchley.* This petitioner would respectfully suggest that the desirability for correct application of *Procunier,* dictates that certiorari issue in this cause.

Wherefore, petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Eighth Circuit, and that this case be reviewed by this honorable court and that the judgment below should be reversed.

JOHN C. DANFORTH
Attorney General
GENE E. VOIGTS
First Assistant Attorney General
KENNETH M. ROMINES
Assistant Attorney General

APPENDIX A

STATE of Missouri, Respondent,

v.

Bert Leroy HUNTER, Appellant.

No. 54769.

Supreme Court of Missouri,
Division No. 1.
July 13, 1970.

Defendant was convicted of murder in the first degree, and from the judgment of the Circuit Court, Andrew County, Fred E. Schoenlaub, J., the defendant appealed. The Supreme Court, Houser, C., held, inter alia, that evidence established that defendant's confession was not involuntary on basis of police coercion arising out of repeated and protracted custodial interrogation or that it was induced by false promises of leniency but that in totality of circumstances the confession was properly admitted.

Affirmed.

Higgins, C., did not participate, and Holman, J., did not sit when the Supreme Court adopted the opinion as the opinion of the court.

1. Criminal Law (Key) 412.1 (4)

Interrogations persisted in to an unreasonable extent, thereby producing mental anguish, or leading suspect to believe that he must make a statement to secure a surcease therefrom, or amounting to mental punishment should be rejected as involuntary.

2. Criminal Law (Key) 520 (1)

Confessions induced by influence of hope of leniency, or hope of mitigation of punishment for crime charged,

or of "worldly advantage" are not voluntary and are inadmissible in evidence.

3. Criminal Law (Key)532

When the voluntary character of a confession is challenged it is duty of trial court to conduct a preliminary hearing outside hearing of jury to determine whether the confession is admissible in evidence, that is, whether it was free of inducement and was voluntarily given.

4. Criminal Law (Key)532

In conducting preliminary hearing to determine whether confession is voluntary the court hears the evidence on mixed question of law and fact and weighs the evidence, and if the evidence shows that confession is voluntary trial court admits the confession in evidence, first making the finding of voluntariness, but if evidence shows that confession is involuntary the trial court must exclude it.

5. Criminal Law (Key)531(1, 3)

The burden of proof of voluntariness of a confession is upon the state when confession is obtained while the suspect is in custody, and the state meets the burden of proof by presenting a prima facie showing of voluntariness; the controlling standard in making of that determination is whether the evidence conclusively shows that the confession is voluntary.

6. Criminal Law (Key)531(3)

Evidence in murder prosecution established that defendant's confession was not involuntary on basis of police coercion arising out of repeated and protracted custodial interrogation or that it was induced by false promises of leniency but that in totality of circumstances the confession was voluntary and hence confession was properly admitted.

7. Criminal Law (Key) 531 (3)

The State made a prima facie case of voluntariness of defendant's confession by showing that at all stages of interrogation defendant was informed of his constitutional rights and that he understood his rights, and that no physical force or coercion, promises, threats or other unlawful means of inducement were employed in obtaining the confession, and such prima facie case was not destroyed by testimony of State's witness that it was possible that prosecuting attorney would consider a lesser charge if defendant would cooperate.

8. Criminal Law (Key) 531 (1)

Even if message conveyed to defendant was reasonably sufficient to induce hope or expectation that he would not be prosecuted to full extent of the law, there was a further question of whether the hope or expectation lighted up on July 16 was still in existence and effective at time he signed confession on August 5, and on such question defendant was entitled to benefit of rule that hope or fear first excited by a promise is presumed to continue until it appears that such original influence has ceased to operate.

9. Criminal Law (Key) 531 (1)

The presumption that hope that defendant would not be prosecuted to full extent of the law if he made a confession was overcome by circumstances that confession was not forthcoming for nearly three weeks after alleged hope arose, and the lapse of time was consistent with view that defendant exercised his own independent judgment about confessing, and that his will was not overborne by the onrush of hope and that the prosecutor's message did not have such an enduring effect as to make involuntary a confession made three weeks later.

10. Criminal Law(Key)531(3)

The discussion between police officer and defendant at time when defendant signed confession as to what would happen if prosecuting attorney filed a first-degree murder charge against him, and statements made by defendant in later interviews confirmed conclusion that there was no "deal" at time defendant confessed that the influence of hope or expectation aroused by message had been removed by time confession was signed, if it ever existed, and that the connection between the message and the confession had become so attenuated as to dissipate the taint.

11. Criminal Law(Key)531(3)

Admission of confession in murder prosecution was not error on ground that state failed to demonstrate that defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel in view of showing that defendant was an intelligent and knowledgeable person with long record of involvement with criminal law, that six times he was informed that he had a right to remain silent and six times he ignored such right and talked, and six times he was offered counsel and he persistently refused to take advantage of the offer.

12. Criminal Law(Key)517.2(1)

The fact that defendant did not have counsel during custodial interrogation and when his confession was taken did not render the confession invalid per se.

John C. Danforth, Atty. Gen., Jefferson City, Charles B. Blackmar, St. Louis, for respondent.

Fred H. Maughmer, Jr., John W. Newhart, Savannah, for appellant.

HOUSER, Commissioner.

Bert Leroy Hunter was convicted by a jury of murder in the first degree and sentenced to life imprisonment. No eyewitness to the killing testified. Defendant's connection with the affair was established only by his confession. Hunter has appealed on the sole ground that the court erred in admitting his confession because it was not given voluntarily.

First, it is said to have been involuntary because it was coerced by the police by repeated and protracted custodial interrogation without counsel and by repeated false promises by police that defendant would receive help and a reduced charge for his cooperation.

[1, 2] It is clear that interrogations persisted in to an unreasonable extent, thereby producing mental anguish, or leading the suspect to believe that he must make a statement to secure a surcease therefrom, State v. Thomas, 250 Mo. 189, 157 S.W. 330, or amounting to mental punishment, State v. Williams, Mo.Sup., 369 S.W.2d 408; State v. Ellis, 354 Mo. 998, 193 S.W.2d 31, should be rejected as involuntary. Likewise, confessions induced by the influence of hope of leniency, State v. Ball, Mo.Sup., 262 S.W. 1043, hope of clemency, State v. Hart, 292 Mo. 74, 237 S.W. 473, or hope of mitigation of punishment for the crime charged, or of "worldly advantage", State v. Williamson, 339 Mo. 1038, 99 S.W.2d 76, are not voluntary and are not admissible in evidence.

[3-5] When the voluntary character of a confession is challenged (but not otherwise, State v. Jackson, Mo. Sup., 448 S.W.2d 895; State v. Gray, Mo.Sup., 432 S.W.2d 593) it is the duty of the trial court to conduct a prelimi-

nary hearing outside the hearing of the jury to determine whether the confession is admissible in evidence, that is, whether it was free of inducement and was voluntarily given. This rule runs through our law from Hector v. State (1829), 2 Mo. 166, to the present time. State v. Glenn, Mo.Sup., 429 S.W.2d 225. The court hears the evidence on the mixed question of law and fact and weighs the evidence. State v. Di Stefano, Mo.Sup., 152 S.W.2d 20. If the evidence shows that the confession is voluntary the trial court admits the confession in evidence, first making the finding of voluntariness in accordance with the rule of Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 and Sims v. State of Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593, as set forth in State v. Glenn, supra, 429 S.W.2d, l. c. 237 [29]. If the evidence shows that the confession is involuntary the trial court must exclude the confession. The burden of proof of voluntariness is upon the State when the confession is obtained while the suspect is in custody. State v. Williams, supra; State v. Bradford, Mo.Sup., 262 S.W.2d 584, 586, and cases cited. The State meets the burden of proof by presenting a prima facie showing of voluntariness. State v. Nolan, Mo.Sup., 423 S.W.2d 815, 818 [9]. The controlling standard which the Supreme Court applies in the making of that determination is whether the evidence *conclusively* shows that the confession is involuntary. State v. Statler, Mo.Sup., 331 S.W.2d 526, 530 [9]; State v. Cochran, 356 Mo. 778, 203 S.W.2d 707 [1]; State v. Pughe, Mo.Sup., 403 S.W.2d 635, 641 [10].

[6-10] When the confession was sought to be introduced in evidence Hunter's attorney objected on the ground of coercion. The court conducted a preliminary hearing outside the hearing of the jury, at the conclusion of which, while expressing concern and "considerable

doubt" about certain testimony given by Sgt. Shirley of the Missouri State Highway Patrol, the trial court made a finding of record that defendant was adequately advised of his constitutional rights; that defendant's statements were made voluntarily and were not procured by coercion, threats or fear and were not induced by promises of leniency, and that they were admissible in evidence. The trial was resumed before the jury; the confession used against Hunter; and while Hunter did not testify before the jury the officers testified to substantially the same facts as in the preliminary hearing and the court properly instructed the jury that before they could consider any alleged statement of Hunter it must have been made voluntarily.

The charges made by Hunter on this appeal require a full and complete review of the evidence of the circumstances surrounding the giving of the confession.

The killing occurred in Andrew County on June 16, 1968. In the early hours of the morning of June 18 Hunter was interrogated for about an hour at the Atchison, Kansas jail with respect to the killing. The city police had stopped Hunter and one Carl Paxton as they were driving in that city, and Hunter had been arrested. Apparently the city authorities notified the Missouri authorities that Hunter was in custody. Sergeant Rhodes of the Missouri State Highway Patrol and the city chief of police questioned him. At that brief session Hunter made no incriminating statements. At the request of the sergeant Hunter promised to appear personally at state highway patrol headquarters at St. Joseph, Missouri the next morning for further questioning. Hunter voluntarily appeared there the next day and was questioned by Sgt. Shirley. Hunter appeared there again on the 19th or 20th of June, voluntarily, and further discussion was had with the of-

ficers about the killing. Hunter was warned as to his constitutional rights each day before questioning began. He was not charged, restrained or under arrest on either of these occasions and he made no incriminating statements, maintaining that he was elsewhere at the time of the killing. The Prosecuting Attorney of Andrew County was present on one of these occasions. Hunter, who was hostile to the prosecuting attorney, called the latter an S.O.B., told him to "get out" and refused to talk further in his presence. The prosecuting attorney withdrew and the talks continued. There is no indication that the interviews at St. Joseph lasted over an hour or two. A few days later Hunter was arrested in Kansas on a charge of illegal possession of a pistol, and from July 13 to September 12 he was in jail in Atchison, Kansas. On July 15 and 16 Missouri highway patrol officers interviewed Hunter in the Atchison jail. These interviews, which lasted about 2 hours each, were conducted at the request of the Prosecuting Attorney of Andrew County. Hunter was again warned of his constitutional rights before each of these interviews took place. On July 15 the officers told Hunter that Carl Paxton had made a statement, a partial admission implicating Hunter. Hunter orally admitted some knowledge of the affair but claimed that he was not inside the tavern where the killing occurred; that he was let out of the car south of town and was picked up later by Paxton and another person, whom he would not identify. Hunter was most concerned about the charge pending against him in Kansas because he had four previous felony convictions in that state. On July 16 Sgts. Shirley and Rhodes again interviewed Hunter at the jail, this time for the purpose of taking a statement. They were joined by Lois Sowards, a secretary in the patrol office, who took shorthand notes on the conversation between Hunter and the officers. Hunter did not want to make a statement until

he talked to the prosecuting attorney. He wanted the latter to come see him to talk about the charges. There was discussion as to what charges would be filed against Hunter. The officers explained that it was the place of the prosecuting attorney to file charges; that it was not "up to the patrol officers what charges would be filed." Several times Hunter requested that Sgt. Shirley confer with the prosecuting attorney "regarding having the charges reduced," and he wanted to see if the prosecuting attorney could get the Kansas charges dropped. Hunter said the only thing he was worried about was "the Kansas law"; that if the prosecuting attorney would get the Kansas charges dropped he would give a statement "in making a deal"; that he was not inside the place where the killing occurred and was not worried about any charge of murder against him "unless they catch me as an accessory." Hunter also said, "Promise me immunity and I can tell you who had the pistol when I seen them and who had blood on his hands and who said 'Gun it.' * * * Offer me immunity now in writing and I will tell you. I will give you a statement. I can tell you where the gun is. I can take you to the place. * * * I don't want to tell you where the gun is till you talk to [the prosecuting attorney] and see if * * * [interruption]."

Sgt. Shirley testified that he relayed Hunter's message to the prosecuting attorney, who told Sgt. Shirley that when he was satisfied that Hunter would cooperate and give a truthful statement he would consider coming to Atchison, and that the prosecuting attorney said to tell Hunter that if he would cooperate "it's possible, very possible, that they would consider a lesser charge"; that Sgt. Shirley went back to the Atchison jail and told Hunter that "it's possible that [the prosecuting attorney] would consider a lesser charge if he would cooperate."

Sergeants Shirley and Rhodes, accompanied by Lois Sowards, the secretary, returned to the Atchison jail on August 5 at the request of Hunter, who had asked that Sgt. Shirley come to Atchison. Before any questioning began Sgt. Rhodes read to Hunter from a sheet of paper containing the warnings about his constitutional rights, and he signed a written waiver, as follows

"Place Atchison, Kansas
Date 8-5-68
Time 1:37 P.M.

"YOUR RIGHTS

"Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can (and will) (B.L.H.) be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.

"WAIVER

"I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

"Signed Bert Leroy Hunter

"Witness James C. Rhodes, Sgt.
Witness Joe Shirley
Time 1:39 P.M. 8-5-68"

Before Hunter signed the waiver. Sgt. Rhodes handed the paper to Hunter, who read it and in answer to questions as to each and every right stated that he understood his rights. The officers testified that at the August 5 session no promises of leniency were made to Hunter and that he was not subjected to duress or coercion to secure any oral or written confession from him. Neither the officers nor Mrs. Sowards testified that there was any discussion relating to a "deal" at the August 5 session. Sgt. Shirley began the questioning. Lois Sowards took down the questions and answers in shorthand. Later that day in Hunter's presence she transcribed them into nine pages of typewriting which Hunter read and corrected. After initialing the corrections Hunter signed his name on each of the 9 pages. The confession related facts showing Hunter's participation with Paxton in the killing of John Lyle in the tavern, the stealing of his money, disposal of the gun, division of the loot, etc. On the first and last pages there was a statement that no threats or promises had been made to Hunter. In the statement Hunter indicated that he realized the possibility that charges would be filed on the basis of the statement. (No charges had been filed on August 5.) The entire session lasted about 4 hours.

Sergeant Shirley further testified that on August 5 he asked Hunter what would happen if after signing this statement the prosecuting attorney would charge him with first degree murder. Hunter replied that he would claim that he had not been informed of his rights; that he had not understood his rights; that "they will believe me and not you"; that he had two witnesses, one of whom was a minister, who would establish an alibi for him, and that he would have himself declared a mental incompetent. According to Sgt. Shirley he returned to visit Hunter on August 26 at which time Hunter "kept asking" that he contact

the prosecuting attorney, wanting to make some kind of deal. Sergeant Shirley told Hunter he had no authority to make a deal but that he would relay the information to the prosecuting attorney, who would do what he saw fit with it. On September 12 there was further conversation in which Hunter "was desirous of having lesser charges filed." Hunter said he thought the first degree murder charge was too severe; that he thought at one time that he might be charged with stealing over $50; that he would testify as a state's witness against Carl Paxton if the prosecuting attorney would cause the Kansas charges to be dropped, and if not he would be unable to testify against Paxton.

Hunter hired an attorney in Kansas, an agreement was reached whereby in exchange for Hunter's waiving extradition the Kansas charge relating to a pistol was dropped, and Hunter was returned to Missouri.

Hunter testified at the preliminary hearing outside the hearing of the jury. He was 22 years of age, and had completed either the ninth or eleventh grade. He stated that at the July 16 interview Sgt. Shirley told him that Carl Paxton had made a statement implicating Hunter in the John Lyle crime but that both patrol officers told Hunter that they did not believe that he was the one; that he couldn't have pulled the trigger and they were willing to help him if he would cooperate; that the prosecuting attorney hated Carl Paxton and believed that Carl Paxton did the actual shooting and they were willing to cooperate with Hunter if he was willing to cooperate with them; that they believed Hunter would receive help and that the officers themselves would help him; that later at the jail Sgt. Shirley told Hunter that he had talked to the prosecuting attorney about the case and that the latter was willing to help Hunter if he would cooperate; that the sergeant said

he had a telephone conversation with the prosecuting attorney who had told him during the telephone conversation that if Hunter would cooperate charges could be as low as stealing over $50. Hunter also testified that Sgt. Shirley said the prosecuting attorney stated that a charge of stealing over $50 would be filed but that he told Sgt. Shirley that he did not want a charge of stealing over $50 filed against him; that he wanted to speak to the prosecuting attorney and work out some way he could have a sentence of a year in the county jail; and that the officer told Hunter that he did not know whether the prosecuting attorney would go that low with charges or not but he would talk to him about it; that the officers wanted a statement and that he understood from Sgt. Shirley that if Hunter made a statement some type of lesser charge would be filed or would be considered, and that was the only reason he later gave the written confession. Asked why he signed the waiver of rights he answered, "Well, because I thought that I would receive a charge of stealing over $50.00 at the most"; that he was offering his cooperation in the case "* * * under the assumption that a deal was to be made," that Sgt. Shirley said that the prosecuting attorney said that a reduction of charges was possible and Sgt. Shirley gave Hunter the impression that the prosecuting attorney was very willing to cooperate and that a reduced charge would be filed, and that was the reason he changed from denying any implication in the crime to the giving of an incriminating statement; that he would not have given the statement August 5 but for this promise of a reduced charge. Hunter further testified that mention was made of cooperation at the August 5 session; that Sgt. Shirley gave him the impression that he was very willing to cooperate and that a reduction of charges was possible; that there was some conversation about an over $50 stealing charge and a year in jail; that later in August the prosecuting attorney

and Sgt. Shirley came to Atchison and handed Hunter a first degree murder warrant; that Hunter asked why he was being charged with this, to which the prosecuting attorney answered, "Mr. Hunter, you don't have anything to deal with"; that Hunter told him that he had the understanding that he was to be charged with stealing over $50.

On none of the several occasions when the officers interviewed Hunter was an attorney present to represent him, nor was an attorney made available to him. Sergeant Shirley testified that Hunter was fully advised and aware of his right to an attorney—was "well-versed" in the law—and that Hunter stated that he did not want an attorney. This was not denied by Hunter. He did not testify that he had requested the appointment or the advice of an attorney and he did not complain of the lack of counsel. Nor did Hunter while testifying complain that the interrogations were persistent, unduly extended, or in any way exhausting or coercive.

There is no evidence in this record of coercion by repeated and protracted custodial interrogation. The six interviews took place over a period of approximately seven weeks, with time intervals of several days between the June and July and the July and August sessions. The first five interviews lasted only an hour or two. The August 5 session at which the written confession was obtained lasted four hours. There is nothing to indicate that these interviews were conducted in uncomfortable quarters, after physical deprivation, under oppressive circumstances or in an atmosphere of hostility, intimidation or coercion. Hunter made no claim in his testimony that his will was overcome by persistent, rigorous, relentless questioning, or that the interrogation was overly long or too frequent. On the contrary, these interviews appear to have been conducted in a calm and dispassionate manner, with regard for

the rights of the suspect. Hunter voluntarily appeared for the two interviews at the St. Joseph patrol office. All of the other four interviews were conducted in a Kansas jail where Hunter was held on Kansas charges. It was at Hunter's own request that the interview of August 5 took place. Instead of conclusively showing that Hunter's confession was sweated out of him the evidence strongly supports a finding and we do find that the confession was not involuntary on the basis of police coercion arising out of repeated and protracted custodial interrogation.

We have reached the conclusion that the evidence does not conclusively show that the confession was induced by false promises of leniency, but rather that in the totality of the circumstances the confession was voluntary, and that therefore the trial court did not err on this basis in admitting the confession. The State made a prima facie case of voluntariness by showing that at all stages of the interrogation Hunter was informed of his constitutional rights and that he understood his rights; and that no physical force or coercion, promises, threats or other unlawful means of inducement were employed in obtaining the confession. The prima facie case thus made was not destroyed by the testimony of State's witness Shirley that it was possible that the prosecuting attorney would consider a lesser charge if Hunter would cooperate. Such a result would follow only if the evidence conclusively showed that the confession was induced by the prosecutor's message. State v. Statler, State v. Cochran and State v. Pughe, supra. There was no such conclusive showing, as a matter of law, in this case. The message delivered by Sgt. Shirley did not contain a promise positive in its terms nor was leniency clearly implied. It was ambiguous and subject to interpretation. All minds would not interpret it as a definite commitment. It might be interpreted not as a promise or probability upon which an expectation or hope of worldly

benefit against the possible criminal charge might reasonably be founded, but merely as evidence of a conciliatory disposition on the part of the prosecuting attorney which might lead to further negotiation and the possibility of finally arriving at an acceptable "deal" with respect to the charges to be filed. All the evidence shows that the idea of a "deal" originated in the mind of Hunter and was not instigated by the officers. Hunter took the initiative. He solicited the sergeant to act as a go-between between him and the prosecuting attorney, and asked the sergeant to have the prosecuting attorney visit him in the Kansas jail to discuss the matter of a reduced charge and the dismissal of the Kansas charge, or to relay his message that he would give a statement in exchange for a reduced charge. He was preoccupied if not obsessed with the idea of a deal. His testimony that he gave the statement because he had an understanding that a lesser charge, perhaps a charge of stealing over $50, would be filed, even if not entirely disbelieved, might be attributed to wishful thinking on his part. With his past criminal record he strongly wished to secure dismissal of the Kansas charge. This wish, coupled with his desire to be treated as lightly as possible for his participation in the Missouri killing, may in his mind have twisted a noncommittal message into a binding understanding. "[A] hope which originates in the mind of the person making the confession, and springs from seeds of his own planting, is not sufficient to render the resulting confession inadmissible." 23 C.J.S. Criminal Law § 825 b., p. 212. The message was not sufficiently definite and unconditional to constitute a legal basis for Hunter's hopes. See United States v. Ferrara, 2 Cir., 377 F.2d 16 [1, 2]; Fernandez-Delgado v. United States, 9 Cir., 368 F.2d 34. In any event, assuming that the message was reasonably sufficient to induce hope or expectation that he would not be prosecuted to the full extent of the law, there is the

further question whether the hope or expectation lighted up on July 16 was still in existence and effective at the time he signed the confession on August 5. On this question Hunter is entitled to the benefit of the rule that hope or fear first excited by a promise is presumed to continue until it appears that such original influence has ceased to operate. State v. Brown, 73 Mo. 631, 633; State v. Condit, 307 Mo. 393, 270 S.W. 286, 290 [3]. That presumption, however, is overcome by the following facts and circumstances: The confession was not immediately forthcoming, within the next few hours or days after Hunter got the message, and was not forthcoming for nearly three weeks, which considerable period Hunter utilized to consider the matter before calling for Sgt. Shirley to come see him. In other words, the influence was not immediately effective. This lapse of time before acting is consistent with the view that Hunter exercised his own independent judgment about confessing, and that his will was not overborne by the onrush of hope; that the prosecutor's message did not have "such an enduring effect" as to make involuntary a confession made three weeks later. Compare Parker v. North Carolina, October Term, 1969, May 4, 1970, 397 U.S. 790, 90 S.Ct. 1458, 25 L.Ed.2d 785. There is the further significant fact, which we find from the evidence, that there was no discussion of the so-called "deal" on the 5th of August when Hunter was finally ready to give his confession. If in fact there had been such an understanding Hunter, who in his testimony showed that he knew there was such a thing as a written guarantee of immunity, would doubtless have insisted upon at least an oral confirmation of the deal before signing away his rights and confessing his crime. Additionally, the officers at that time carefully and scrupulously advised him of his constitutional rights. He knew that he did not have to give this statement and that it would be used against him. Furthermore, in his written

confession he twice recited that no promises had been made to him and demonstrated his knowledge that the confession probably would be used as the basis of a criminal charge. The discussion between Sgt. Shirley and Hunter on August 5 as to what would happen if the prosecuting attorney filed first degree murder charges against him, and statements made by Hunter in the interviews later in August, confirm our conclusion that there was no "deal" at the time Hunter confessed, and that the influence of the hope or expectation aroused by the message had been removed by August 5, if it ever existed in the first place; that the connection between the message and the confession had "become so attenuated as to dissipate the taint." Wong Sun v. United States, 371 U.S. 471, 491, 83 S.Ct. 407, 419, 9 L.Ed.2d 441; Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307. Finally, it stretches credulity to believe and it is unreasonable to propose that a prosecuting attorney would enter into an agreement with a suspect to let him off with a charge of grand stealing in exchange for his confession demonstrating the commission of a ruthless, premeditated, deliberate murder.

The only authority cited by Hunter on this phase of the appeal, State v. Williamson, supra, is to be distinguished from this case on these grounds: the promise there was definite; the confession followed closely upon the heels of the promise (the next day); the officer making the promise testified that he presumed his promise had some influence in inducing the confession; the record clearly established that the promises made by the officers did arouse a hope or expectation in Williamson that he would be sent to the penitentiary at Chester, Illinois; that it was a promise of immunity, and that these promises were sufficiently definite and unconditional to constitute a legal basis for his hopes.

[11, 12] Hunter's final point is that the court erred in admitting the confession because his constitutional rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974, were not knowingly and intelligently waived. The argument, without any attempt at demonstration, is that the State failed to carry the heavy burden which rests upon the State to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain or appoint counsel. Although not a highly educated man, Hunter is an intelligent and knowledgeable person with a long record of involvement with the criminal law, whose answers to questions propounded to him during the preliminary hearing amply demonstrate his familiarity with legal terms and concepts and criminal procedures. Six times he was informed that he had a right to remain silent, and six times he ignored this right and talked. There is no doubt on this record that he fully understood the privilege against self-incrimination. Six times he was offered counsel and informed that if he did not have the resources to employ counsel he would be afforded counsel without charge. He persistently refused to take advantage of this offer, stating that he did not want a lawyer. He was a grown man, fully able to converse in the language of his captors and to negotiate with them, fully cognizant of the functions and benefits of counsel, and fully able to appraise his personal need or lack of need of counsel. The fact that Hunter did not have counsel during the custodial interrogation and when his confession was taken did not render the confession invalid per se. State v. Davis, Mo. Sup., 400 S.W.2d 141, 149 [16]; State v. Pughe, supra, 403 S.W.2d l.c. 640 [8]. This point is without substance.

The judgment of conviction is affirmed.

WELBORN, C., concurs.

HIGGINS, C., not participating.

PER CURIAM:

The foregoing opinion by HOUSER, C., is adopted as the opinion of the court.

SEILER, P. J., BARDGETT, J., and CORNING, Special Judge, concur.

HOLMAN, J., not sitting.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

BERT LEROY HUNTER,
Petitioner,
vs.
HAROLD R. SWENSON,
Respondent.

Civil Action No. 18635-2

Order Denying Petition for Habeas Corpus

(Filed September 23, 1970)

Petitioner, presently confined in the Missouri State Penitentiary, was convicted by a jury in the Circuit Court of Andrew County of murder in the first degree, and on May 22, 1969, was sentenced to a term of life imprisonment. He appealed his conviction to the Missouri Supreme Court, which affirmed on July 13, 1970. *State* v. *Hunter*, (Mo. Sup.) 456 S.W. 2d 314.

The contentions presented in this petition are identical to those raised on appeal; therefore, for the purposes of this action, petitioner has exhausted his state remedies. *White* v. *Swenson*, (W.D. Mo. en banc) 261 F. Supp. 42, 62. Presently before the Court are the transcript on appeal and briefs of the parties on appeal. After a study of the transcript and briefs, and in the light of recent decisions by the Supreme Court [See *McMann* v. *Richardson*, 397 U.S. 759 (1970)], the Court is convinced that there is no necessity of an evidentiary hearing. This is particularly true since the questions raised herein are questions of law and not of fact. The sole question before this Court is whether or not the Missouri Supreme court applied the appropriate

federal standards to the question of the voluntariness of the confession.

In support of his petition for habeas corpus, Hunter raises three points alleging that his confession which was admitted into evidence at his trial was involuntary: (1) that it was coerced by repeated and protracted interrogation without the presence of counsel; (2) that it "was obtained in the absence of a knowing and intelligent waiver of his rights under *Miranda* v. *Arizona*, 384 U.S. 436;" and (3) that it was procured by false promises of a reduced charge for his cooperation.

When a defendant objects to the admission of his confession, he is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are reliably determined. *Jackson* v. *Denno*, 378 U.S. 368, 391. In *Sims* v. *Georgia*, 385 U.S. 538, the Supreme Court specified that a jury may not hear a confession until the trial judge has determined that it has been freely and voluntarily given by the defendant. The trial judge's opinion must clearly reflect his conclusion that the confession is voluntary. In this case, there was a fair hearing on the issue of voluntariness, and the trial judge expressly found that the confession was voluntary.

Briefly, the facts are that the murder occurred on June 16, 1968. On June 18 Hunter, who had been arrested by Kansas police, was questioned by Sgt. Rhodes of the Missouri State Highway Patrol for about an hour. Hunter agreed to appear at the State Highway Patrol headquarters in St. Joseph on the next day for further questioning. He appeared for questioning twice at the headquarters, and was interviewed by Sgt. Shirley, both sessions lasting between one and two hours. Shortly thereafter, Hunter was again interviewed by Sgts. Rhodes and Shirley for about two hours each day. On none of these occasions did Hunter

made a statement, although on July 15 he orally admitted some knowledge of the murder. On August 5, at Hunter's request, the two officers and a stenographer returned to the jail for the purpose of taking a statement.

The officers testified that Hunter had been orally advised of his rights before every interview, that he stated he understood his rights and that he waived such rights. On August 5, when Hunter confessed, he signed a written waiver of rights after reading the waiver and after acknowledging that his rights were explained to him. Hunter, during the preliminary hearing on the question of voluntariness, stated that he did not recall being advised of his rights before being questioned, but he could not say definitely that he had not been advised.

Hunter at the time of making his confession was 22 years old, had at least a ninth grade education (and possibly an 11th grade), and was familiar with criminal process and his rights, for he had been arrested on several prior occasions.

At the July 16 questioning some discussion was had about making a "deal" for a lesser charge. The discussion was apparently initiated by Hunter. The officers explained to Hunter that they had no authority to determine what charges would be filed, since such determination was the province of the prosecutor, Alden Lance. Hunter asked Sgt. Shirley to confer with Lance about reducing the charge and getting the Kansas charges dismissed. Sgt. Shirley apparently spoke to the prosecutor, and later told Hunter that "it's possible that [the prosecutor] would consider a lesser charge if he would cooperate." This was the only discussion on leniency according to Shirley. Hunter testified that Sgt. Shirley told him that if he would cooperate charges as low as stealing over $50 might be filed against him; that he signed the waiver because he

thought he "would receive a charge of stealing over $50.00 at the most;" and that he cooperated because he was "under the assumption that a deal was to be made." Further, he stated that Shirley gave him the impression that the prosecuting attorney was very willing to cooperate with him by filing a reduced charge, and that this promise was the only reason he changed from denying any participation in the crime to the giving of a confession.

On August 5, before making his statement, Hunter, after being explained his rights, signed a waiver of those rights, which included the statement, "No promises or threats have been made to me and no pressure of any kind has been used against me." Sgts. Shirley and Rhodes and Mrs. Sowards, the stenographer, testified that no discussion took place on this date about a deal.

I.

There is no merit to Hunter's contention that the confession was the result of repeated and protracted interrogation by the highway patrolmen. Hunter bases his allegation solely on the fact that he was questioned five times before giving his confession at the sixth interview. There is no allegation nor a hint of evidence that the interviews were conducted under hostile, coercive, or oppressive conditions; nor does it appear that Hunter was overcome with persistent, relentless questioning. There were six interrogations within a seven-week period, and only one session, the August 5th one (where his statement was taken and transcribed) lasted over two hours. Furthermore, Hunter voluntarily appeared on two occasions for questioning, and the August 5th session was at his request. Under these facts, the confession was not obtained as a result of protracted and repeated interrogation.

Petitioner also makes an oblique reference to the fact that he was not represented by counsel at any time that he

was interrogated and when he signed his statement. At every interrogation, Hunter was advised of his rights, including those relating to counsel, and every time, he waived them. The mere fact that counsel was not present at the time the statement was given does not, by that fact alone, make a confession involuntary. *Lewis* v. *State of Oklahoma*, (W.D. Okla.) 304 F. Supp. 116, 122; *United States* v. *Ogle*, (C.A. 5) 418 F. 2d 238, 239. Counsel is available on request of an accused. *Escobedo* v. *Illinois*, 378 U.S. 478. While a waiver cannot be presumed from the silence of an accused, the circumstances surrounding the obtaining of confession may indicate that a waiver has occurred. See *Boykin* v. *Alabama*, 395 U.S. 238; *Carnley* v. *Cochran*, 369 U.S. 506; *Sullins* v. *United States*, (C.A. 10) 389 F. 2d 985. It is not necessary that one accused of crime expressly decline the assistance of counsel in order that statements made voluntarily by him may be used against him. *Bond* v. *United States*, (C.A. 10) 397 F. 2d 162, cert. den. 393 U.S. 1035.

II.

The question then becomes, and it is petitioner's second contention, whether or not Hunter's confession was obtained in the absence of a knowing and intelligent waiver of his rights under the provisions of *Miranda, supra.* It is now text-book law that an accused must be fully advised of his rights before interrogation. But it is equally well-established that after being advised an accused can voluntarily, knowingly and intelligently waive those rights.

In the hearing on the voluntariness of the confession held outside the hearing of the jury, the trial court specifically found that Hunter "was adequately advised of his rights under the Constitution." The trial court based its finding on the testimony of the officers and two exhibits—a laminated card containing the rights read by one officer

to Hunter and the written waiver statement signed by Hunter. There is nothing clearly erroneous in the trial court's finding, and therefore we find that Hunter was adequately advised.

The record before us also convinces us that Hunter knowingly and intelligently waived his rights within the standards laid down in *Miranda*. Six times he was advised, and six times he elected not to remain silent and not to ask for counsel. [See *Menendez* v. *United States*, (C.A. 5) 393 F. 2d 312, 317.] On the sixth occasion he signed a written waiver. The record indicates at the time of the signing of the waiver, Hunter was 22 years old and had either a ninth or eleventh-grade education. He was knowledgeable about legal terms, at one time demanding a written promise of immunity in return for his cooperation. He had had at least four prior felony convictions so that he was familiar with legal process.

From a study of the record as a whole, we are convinced that Hunter, being adequately advised of his rights, made an intelligent, knowingly and voluntary waiver of his rights as found by the trial court.

III

Hunter's last contention is that his confession was involuntary because it was based upon the false promise of a reduced charge for his cooperation. As stated above, Hunter initiated discussion about a "deal" with the interrogating officers, and after being informed that they could not make such a "deal", solicited Sgt. Shirley to act as a go-between for him with the prosecuting attorney. Shirley stated that, after speaking to Lance, he told Hunter that it was possible reduced charges would be considered in return for his cooperation. Hunter further testified that a charge as low as stealing over $50.00 was discussed, but the officer never admitted this.

In *Malloy* v. *Hogan,* 378 U.S. 1, the Supreme Court ruled that the admissibility of a confession in state criminal trials is to be tested by the same standard applicable to federal prosecution. That standard has been text-book law since 1897.

> [A] confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . *Bram* v. *United States,* 168 U.S. 532, 542-543, 18 S. Ct. 183, 187, 42 L. Ed. 568 (1897).

See also *Bell* v. *Alabama,* (C.A. 5) 367 F. 2d 243.

The petitioner must rely on the phrase "nor obtained by any direct or implied promises, however slight," since no definite promise was ever made to him. That language has never been applied "with wooden literalness." *United States* v. *Ferrara,* (C.A. 2) 377 F. 2d 16, 17. Consistent holdings of the Supreme Court make clear that voluntariness is determined by an examination of the totality of the circumstances—that is, whether the circumstances disclose that the conduct of the official to whom the confession or admission was made was such as to "overbear the defendant's will to resist and bring about a confession or admission not freely self-determined." *Fernandez-Delgado* v. *United States,* (C.A. 9) 368 F. 2d 34, 36; *United States* v. *Ferrara, supra*; *Rogers* v. *Richmond,* 365 U.S. 534, 544.

It has also been held that if the confessor believed that a reciprocal promise had been made to him in exchange for his confession, even though no such promise had in fact been made, that such a confession is involuntary and therefore inadmissible against him. *United States ex rel. Thurmond* v. *Mancusi,* (E.D. N.Y.)

275 F. Supp. 508, 516; *United States ex rel. Casserino v. Denno*, (S.D. N.Y.) 259 F. Supp. 784, 790; *Grades v. Boles*, (C.A. 4) 398 F. 2d 409, 412; *United States v. Harris*, (E.D. Wisc.) 301 F. Supp. 996, 999.

There was no definite promise to Hunter, only a statement that a lesser charge might be considered. Hunter did not immediately act upon that statement. In fact, it was almost three weeks later before he made any incriminating statements. At the time he did make a confession, there was no discussion of a "deal". Further, on the first and last pages of his written statement, Hunter acknowledged that no promises had been made to him. Shirley testified that on August 26, when he again visited Hunter in the Kansas jail, Hunter kept asking that he contact the prosecuting attorney in order to make a deal. Further, after signing the confession, Hunter and Shirley discussed what would happen if the prosecutor filed first degree murder charges against him.

The record also reveals that Hunter was quite anxious to secure a dismissal of the Kansas charges, particularly in view of the fact that he had four prior felony convictions in that state. During the July 16 discussion, the officers testified that Hunter stated he was only worried about "the Kansas law," and that if Kansas charges were dismissed he would give a statement "in making a deal." Sometime after his statement, the Kansas charges were dismissed.

It seems apparent to this Court that Hunter did not believe a deal had been made at the time he made his confession, since he was attempting to make a "deal" for reduced charges three weeks after the confession. It is obvious that he hoped by confessing that charges would be reduced. This is not the case where his will to resist

was overborne by a promise of leniency. Hunter exercised his independent judgment in confessing, and in the totality of circumstances, his confession was voluntary and therefore admissible against him.

For the foregoing reasons, it is

ORDERED that the petition for habeas corpus be, and it is hereby, denied.

/s/ Wm. R. Collinson
District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,601

Bert Leroy Hunter, Appellant,
v.
Harold R. Swenson, Warden, Appellee.

Appeal from the United States District Court for the Western District of Missouri.

[April 26, 1971.]

Before VOGEL and ROSS, Circuit Judges, and STEPHENSON, Chief District Judge

---

Ross, Circuit Judge.

Hunter brought this action for a writ of habeas corpus against Swenson, the warden of the Missouri State Penitentiary. The trial court entered an order denying the petition and refusing to grant an evidentiary hearing. We reverse with directions to the trial court to hold an evidentiary hearing.

Hunter was charged with first degree murder in an amended information filed in the Circuit Court of Andrew County, Missouri on March 10, 1969. He pleaded not guilty and was convicted after a trial to a jury on May 1, 1969. After his motion for new trial was overruled, he was sentenced to life imprisonment. On appeal, the Missouri Supreme Court affirmed the conviction. *State* v. *Hunter*, 456 S.W.2d 314 (Mo. 1969).

At Hunter's trial there was no direct evidence linking him to the killing except his confession. The only issue briefed and argued before the Supreme Court of Missouri was the admissibility of the confession. At his trial and on appeal, Hunter claimed that it was not voluntary in that it was induced by repeated and protracted custodial interrogation without counsel and by false promises of the police that he would receive help and a reduced charge for his cooperation. Hunter also claimed the confession should not have been received in evidence because his constitutional right to counsel was not knowingly and intelligently waived.

The murder occurred on June 16, 1968. On June 18, 1968, Hunter was interrogated by Sgt. Rhoades of the Missouri Highway Patrol and released. He was again interrogated later the same day by Sgt. Rhoades and Sgt. Shirley, by the prosecutor, Mr. Lance, and by other law enforcement officials. He was interrogated further on June 19 or 20 by Sgt. Shirley. On July 15, Hunter was again questioned while in custody of the police in Atchison, Kansas by Sgt. Shirley and another trooper. The interrogation was continued on July 16 and at that time there was some discussion initiated by Hunter about making a deal for a lesser charge and getting the Kansas charges dropped in return for Hunter's cooperation. Sgt. Shirley agreed to convey this suggestion to Mr. Lance, the prosecutor. He also told Hunter that another individual made a partial statement about the murder implicating Hunter. Hunter made oral statements at the time indicating some knowledge of the murder but denied having been at the murder scene and declined to make a written statement.

On August 5, 1968, Sgt. Shirley and Sgt. Rhoades, together with a court reporter, Mrs. Sowards, visited

Hunter in jail in Atchison, Kansas. This contact was the result of a message to Sgt. Shirley from a friend of Hunter conveying Hunter's request to talk to Sgt. Shirley again. At that time, Hunter gave a confession to Sgt. Shirley and Sgt. Rhoades which was transcribed by Mrs. Sowards and signed and initialed by Hunter. Prior to signing the confession, Hunter was formally advised of his rights by Sgt. Rhoades from a card which he carried with the standard questions and warnings printed thereon.

These facts are not seriously in dispute. The disputed point is whether or not on August 5, 1968, immediately prior to the confession of Hunter, Sgt. Shirley promised or implied that the prosecutor, Mr. Lance, was willing to consider a reduced charge in return for Hunter's cooperation in the form of the signed confession.

The Supreme Court of Missouri commented on that question as follows:

> "There is the further significant fact, which we find from the evidence, that there was no discussion of the so-called 'deal' on the 5th of August when Hunter was finally ready to give his confession. If in fact there had been such an understanding Hunter, who in his testimony showed that he knew there was such a thing as a written guarantee of immunity, would doubtless have insisted upon at least an oral confirmation of the deal before signing away his rights and confessing his crime."

State v. *Hunter, supra,* 456 S.W.2d at 321.

The United States District Court in its order denying the writ of habeas corpus made a similar finding.[1]

---

1. "On August 5, before making his statement, Hunter, after being explained his rights, signed a waiver of those rights, which included the statement, 'No promises or threats have been made to me and no pressure of any kind has been

Prior to Hunter's original trial, his attorney filed a motion to suppress the confession. The state trial court (Judge Yeaman) on March 11, 1969 held a hearing on that motion at which hearing Hunter Sgt. Shirley, and Sgt. Rhoades testified. The motion to suppress was overruled.

At the trial of the murder case in state circuit court, the court (Judge Schoenlaub) held a hearing on the voluntariness of the confession outside the hearing of the jury. During this hearing Hunter and Mrs. Sowards testified, and Sgt. Shirley's testimony given at the hearing of the the motion to suppress was received in evidence by stipulation of the parties. Sgt. Rhoades did not testify at this hearing and his earlier testimony was not received in evidence at this time.

After the Court had determined that the confession was voluntary and could be received in evidence, the jury returned and the trial continued.[2]

---

used against me.' *Sgts. Shirley and Rhodes [sic] and Mrs. Sowards, the stenographer, testified that no discussion took place on this date about a deal.*" (emphasis supplied)

In the same opinion, the United States District Court stated:

> "There was no definite promise to Hunter, only a statement that a lesser charge might be considered. Hunter did not immediately act upon that statement. In fact, it was almost three weeks later before he made any incriminating statements. At the time he did make a confession, there was no discussion of a 'deal'."

2. In ruling on the admissibility of the confession the state trial court made the following observation:

> "I am concerned about the testimony of Sergeant Shirley that was found on page twenty-seven of the March 11 transcript. The legal effect of those words is a matter that will have to be determined by an appellate court, if this matter is appealed. Also, I do have considerable doubt because of that one point. I am going to overrule the objections."

The testimony of Sgt. Shirley (on pages 26, 27 and 28 of the March 11, 1969 transcript) which concerned the court is as follows:

> "Q. And you testified that Hunter asked to relay a message to Mr. Lance concerning a reduced charge. You testified to that?
>
> A. Yes.

Sgt. Shirley then testified concerning the circumstances surrounding the confession. Mrs. Sowards also testified to the effect that on August 5, 1968 she was not in the interrogation room at all times, but she did not hear either Sgt. Rhoades or Sgt. Shirley make any promise or convey any message from the prosecuting attorney, Mr. Lance, to Hunter relating to possible reduction of the charges. Again St. Rhoades did not testify and his testimony from the hearing on the motion to suppress was not received in evidence.

Q. Did you relay that?

A. Yes, I did.

Q. In return did you relay a message back to Mr. Hunter?

A. The only message I ever relayed back to Mr. Hunter was Mr. Lance informed me—I must qualify this—Mr. Hunter also requested Mr. Lance contact him personally at the jail. This information was relayed to Mr. Lance. But I didn't relay any information back to him, other than I told him that Mr. Lance told me that when Mr. Lance was satisfied he would cooperate and give a truthful statement, at that time he would consider coming to Atchison.

Q. Well, when you relayed the information back to Mr. Lance concerning the reduced charge—You did relay that information you said to Mr. Lance?

A. Yes, I did sir.

Q. After talking to Mr. Lance didn't you go back down and talk to Mr. Hunter and tell him what Mr. Lance had told you to say.

A. Yes. I just repeated what he told me to say.

Q. Didn't Mr. Lance tell you to say that if he would cooperate it's possible, very possible that they would consider a lesser charge?

A. That's right.

Q. Then you told Mr. Hunter that?

A. I said 'it's possible'.

Q. You said it's possible, it's possible that Mr. Lance would consider a lesser charge if he would cooperate? You relayed that message to Mr. Hunter?

A. I did.

Q. Those were words spoken by Mr. Lance that you relayed to Mr. Hunter in the Atchison County Jail?

A. Right.

Q. Prior to the time of the statement?

A. Yes, sir."

The testimony of Sgt. Rhoades which was not presented except at the March 11, 1969 hearing on the motion to suppress was significant in two ways: First, Sgt. Rhoades testified he had not been present when Sgt. Shirley interrogated Hunter on July 15 and 16, so it is obvious that if he heard any communication from Sgt. Shirley to Hunter purporting to convey a message from the prosecutor, it had to be on August 5, 1968. Secondly, his testimony is clear that on August 5, 1968 he overheard Sgt. Shirley tell Hunter immediately prior to obtaining Hunter's confession something "similar to 'Mr. Lance said it's possible.'" Rhoades also testified that he thought Sgt. Shirley meant by this that "[i]f Bert Hunter were to give a statement where he would be testifying against Carl Paxton as to Mr. Lyle's death, then there might be some leniency shown to Bert Hunter by the prosecuting attorney."[3]

---

3. The testimony of Sgt. Rhoades (on pages 36, 39-41 of the March 11, 1969 transcript) includes the following:

"Q. Sgt. Rhoades, more specifically, did you ever talk to Mr. Hunter at the Atchison County Jail in Kansas?

A. Oh, yes. Pardon me. On August 5.

Q. How about prior to August 5th, had you accompanied Sgt. Shirley down there on any prior trips that he had made to Atchison to talk to Mr. Hunter?

A. No.

. . .

Q. Sgt. Shirley, in the course of your direct testimony where you were being questioned about whether any promises of leniency had been made to Mr. Hunter, you made reference to 'tts [sic] possible', and that's where you left off, would you explain that for me please?

A. All I'm aware of, Sgt. Shirley, Mrs. Sowards and myself and Bert Hunter were in the room in the Atchison County—Pardon me, the Sheriff's Office in Atchison, Kansas, and Sgt. Shirley made a statement similar to 'Mr. Lance said its [sic] possible'. Now, this is all I know of.

Q. Do you know what he was referring to at that time, what Sgt. Shirley was referring to?

A. No, sir.

Q. You don't know what prompted that statement from Sgt. Shirley to Mr. Hunter?

A. Well, can I say what I think prompted it? I don't know. I don't know what prompted it.

A study of the transcript of the testimony at the March 11, 1969 hearing and the testimony at the trial convinces this Court that the conclusions reached by the Supreme Court of Missouri on the appeal and by the United States District Court in this habeas corpus proceedings were based, at least in part, upon an incorrect determination that the interrogation of Hunter on August 5, 1968 prior to his confession, did not include any discussion of a possible "deal" on the requested reduction of the charge to be filed. Whether a correct determination of this fact would have changed the decision reached by either court is not known, but Hunter claims that he is entitled to have this decision made on the basis of a correct factual determina-

---

Q. I'm asking you if you know what prompted it?

A. No, actually not.

Q. Did you know what Sgt. Shirley was talking about?

A. I thought I did, yes.

Q. Tell me what you thought he was talking about.

A. Well, if Bert would give—If Bert Hunter were to give a statement where he would be testifying against Carl Paxton as to Mr. Lyle's death, then there might be some leniency shown to Bert Hunter by the Prosecuting Attorney. This was what Bert Hunter wanted you might say, leniency if he were to testify.

Q. This was your understanding and your impression then from that conversation, or from that statement by Sgt. Shirley to Mr. Hunter?

A. That this was a message, 'its [sic] possible'.

Q. A message from whom Sgt. Rhoades?

A. Well, see I don't know. Sergeant Shirley was telling Bert 'its [sic] possible'. Do you mean do I know who it was from?

Q. Yes?

A. No, sir.

Q. Did Sgt. Shirley say he was relaying it from anyone?

A. Well, Sgt. Shirley—As I recall, I would have thought it was a relay from Mr. Lance on this.

Q. To Mr. Hunter?

A. Yes, sir.

Q. Sgt. Rhoades, this conversation, was it before or after Mr. Hunter signed the waiver, I believe which has been marked Exhibit Number 1? Yes, State's Exhibit 1.

A. I would say that was prior to this statement."

tion after careful scrutiny of the state court record as a whole and after an evidentiary hearing to clarify the facts in dispute; especially since both the Supreme Court of Missouri and the Federal District Court for the Western District of Missouri placed some emphasis on the timing of the conversations relating to the possibility of reduced charges.

I. EXHAUSTION OF STATE REMEDIES

The contentions raised by Hunter in this habeas corpus action are substantially the same as those raised on his appeal to the Supreme Court of Missouri. Therefore, for the purpose of this action, Hunter has exhausted his state remedies even though he has not complied with state post conviction procedures under Missouri Supreme Court Rule 27.26. This Court held in *Edwards* v. *Swenson*, 429 F.2d 1291, 1293 (8th Cir. 1970) that a Missouri prisoner need not pursue his post conviction remedy under Rule 27.26 where the merits of his contentions had already been determined by the Missouri Supreme Court on direct appeal. See also *Connors* v. *State*, 422 F.2d 122, 125 (8th Cir.), *cert. denied*, 398 U.S. 954 (1970); *Kennedy* v. *Sigler*, 397 F.2d 556, 559 (8th Cir. 1968). Accord: *United States ex rel. Adams* v. *Pate*, 418 F.2d 815, 817 (7th Cir. 1969); *Smith* v. *Peyton*, 408 F.2d 1009, 1010 (4th Cir. 1968); *Whippler* v. *Balkcom*, 342 F.2d 388, 390 (5th Cir. 1965).

II. ALLEGATIONS CONCERNING ADMISSIBILITY OF THE CONFESSION

The Supreme Court of Missouri in *State* v. *Hunter*, *supra* at 316, stated the law of the State of Missouri concerning the admissibility of confessions in that state as follows:

> "[C]onfessions induced by the influence of hope of leniency, State v. Ball, Mo.Sup., 262 S.W. 1043, hope of clemency, State v. Hart, 292 Mo. 74, 237 S.W. 473,

> or hope of mitigation of punishment for the crime charged, or of 'worldly advantage,' State v. Williamson, 339 Mo. 1038, 99 S.W.2d 76, are not voluntary and are not admissible in evidence."

In so stating the law, the Missouri Supreme Court did not cite *State* v. *White*, 316 Mo. 576, 292 S.W. 411 (1927), a case which presents a fact situation very similar to that of this case. White, while in jail and charged with murder in the first degree, confessed after the prosecuting attorney had promised him he would recommend minimum punishment and had told him that a co-defendant had confessed. The Court stated:

> "By all the authorities that confession was not voluntary. The defendant was in jail at the time, and his interview was with the prosecuting attorney and the sheriff—persons in authority—and the law presumes that a confession thus induced is involuntary."

State v. *White*, *supra*, 316 Mo. at 580, 292 S.W. at 412. The distinguishing factor between the *White* case and that of Hunter is that the alleged promise was made directly, rather than indirectly, by the prosecuting attorney and was made after the murder charge had been filed. However, this is a distinction without a substantial difference inasmuch as the alleged promise was made by a "person in authority". In Hunter's case, Sgt. Shirley was such a "person in authority"

This state rule is even more rigid than the one adopted by the Supreme Court of the United States. As stated in *Cummings* v. *United States*, 398 F.2d 377, 381-382 (8th Cir. 1968):

> "The standard to be applied by this Court in determining whether a confession is incompetent because not voluntary 'is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be com-

> pelled in any criminal case to be a witness against himself."' Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). 'Under this test the constitutional inquiry is not whether the conduct of * * * officers in obtaining the confession was shocking, but whether the confession was "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."' Malloy v. Hogan, 378 U.S. 1, 7, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964)."

See also *Shotwell Mfg. Co.* v. *United States,* 371 U.S. 341, 347 (1963). In *Brady* v. *United States,* 397 U.S. 742, 754 (1970), the Supreme Court noted:

> "*Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess."

Since Hunter has stated in his petition for habeas corpus that his confession was procured by false promises of a reduced charge for his cooperation at a time when he was in jail and unrepresented by counsel, we conclude that his petition did make allegations which would, if proven to be correct, properly be the basis for the relief requested. *Procunier* v. *Atchley,* 39 U.S.L.W. 4125, 4127 (U.S. Jan. 19, 1971).

III. NECESSITY OF EVIDENTIARY HEARING

Since Hunter has exhausted his state remedies and made allegations which if proven to be true could be the basis for granting the writ, we pass now to the question of whether an evidentiary hearing should have been granted.

In the case of *Townsend* v. *Sain*, 372 U.S. 293 (1963) at 313, the Supreme Court held "that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." In 1966 these requirements were codified by 28 U.S.C. § 2254(d). See *Hawkins* v. *Bennett*, 423 F.2d 948, 950 (8th Cir. 1970); *Howard* v. *Swenson*, 404 F.2d 469, 472 (8th Cir. 1968); *White* v. *Swenson*, 261 F.Supp. 42, 60 (W.D. Mo. 1966), (en banc); Lay, *Post Conviction Remedies, and the Overburdened Judiciary: Solutions Ahead*, 3 Creighton L. Rev. 5, 11-12 (1969). 28 U.S.C. § 2254(d) provides that the decision of the state court shall be presumed correct unless the petition comes within one of a number of specified exceptions. One of the exceptions is "that the material facts were not adequately developed at the State court hearing." 28 U.S.C. § 2254(d)(3); *Townsend* v. *Sain, supra* at 313; *Hawkins* v. *Bennett, supra* at 950; *Howard* v. *Swenson, supra*, at 472; *Roach* v. *Bennett*, 392 F.2d 743, 748 (8th Cir. 1968). Another exception is "that such factual determination is not fairly supported by the record." 28 U.S.C. § 2254(d)(8); *Townsend* v. *Sain, supra* at 313; *Hawkins* v. *Bennett, supra* at 950; *Howard* v. *Swenson, supra* at 472. Accord, *Anderson* v. *Nelson*, 432 F.2d 55, 56 (9th Cir. 1970); *O'Neal* v. *Smith*, 413 F.2d 269, 270-271 (5th Cir. 1969). Both of these exceptions tend to overlap. In looking for guidance

to their meaning, we turn to *Townsend*. In speaking of these exceptions, *Townsend* observed that:

> "This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights." *Townsend, supra* at 316.

Townsend then provided:

> "Where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record. . . . The duty of the Federal District Court on habeas is no less exacting." *Townsend, id.*

and

> "The duty to try the facts anew exists in every case in which the state court has not after a full hearing reliably found the relevant facts." *Townsend, supra* at 318.

Having carefully scrutinized the state court records and for reasons already mentioned, this Court believes that Sgt. Shirley's discussion with Hunter concerning a possible lesser charge on August 5, 1968 was a material and relevant fact which, because of the ommission of Sgt. Rhoades' testimony at the state court trial of Hunter, was not adequately developed. In determining that there was no discussion of the so-called "deal" on August 5, 1968, the State Supreme Court appears to have made an incorrect fact determination that could have influenced its primary decision that Hunter's confession was voluntary. Therefore, in accordance with 28 U.S.C. § 2254(d)(3) and (8) and *Townsend*, an evidentiary hearing on the allegations contained in Hunter's petition is mandatory.

Reversed and remanded with directions to hold an evidentiary hearing.

STEPHENSON, Chief District Judge (Dissenting)

I dissent. I am satisfied, from an examination of the entire record herein, that the factual issues relating to appellant's claim that his statement[1] was involuntary were fully developed and resolved in state trial court proceedings, after a full and fair hearing which resulted in a finding that appellant's statements, written and oral, were voluntary. This finding was amply supported by the record before the state trial court. Appellant is not entitled to another plenary hearing on the same issues. 28 U.S.C. § 2254(d); *Townsend* v. *Sain*, 372 U.S. 293, 312-16 (1913); *Wade* v. *Yeager*, 377 F.2d 841, 844 (3d Cir. 1967), *cert. denied*, 393 U.S. 893 (1968).

On March 11, 1969, more than six weeks prior to trial, the state court conducted a hearing on appellant's motion to suppress the statement in dispute upon the grounds that the same was involuntary and given by the appellant while he was under the impression that he was to be given leniency if he cooperated in giving a statement. Appellant, who was represented by two attorneys, testified during this hearing, as did the two officers, Sgt. Shirley and Sgt. Rhoades, who were present when his statement was taken. After hearing the evidence, Judge Yeaman specifically found that the statement in question "* * * was voluntarily made by the defendant, was not procured by coercion or threats or through fear, was not induced by promises of leniency. The Court finds that the statement in question is competent evidence and therefore overrules the defendant's objections and admits the statement in evidence." The Court, in response to a question by counsel for the defendant, made it clear that the ruling of admissibility applied to all oral statements, as well as the written

1. At issue is the voluntariness of a written statement and oral statements made in connection therewith.

statement in question. After ruling on the motion to suppress, the Court conducted a hearing on defendant's motion to produce, inspect, and copy, during which the prosecuting attorney was examined under oath concerning the existence or non-existence of any information in his possession favorable to the defendant. At the close of the hearing, the Court spoke concerning the prosecutor's duty and burden in the subsequent trial to establish that the statements taken from the defendant were voluntary, requested the court reporter to transcribe that part of the record having to do with a motion to suppress and directed him to furnish a copy to the court, defense counsel and the prosecutor.

During the trial which commenced April 30, 1969, a hearing concerning the voluntariness of appellant's statements was held out of the presence of the jury in compliance with *Jackson* v. *Denno*, 378 U.S. 368 (1964). At the commencement of the hearing, the trial court[2] made specific inquiry of both of defendant's attorneys and defendant Hunter as to whether they had had an opportunity to read the transcript of the hearing before Judge Yeaman on the motion to suppress. Both the defendant and his attorneys replied in the affirmative. Counsel for the defendant then stated that the defendant was prepared to agree that Sgt. Shirley's testimony as it was previously given on the motion to suppress be used in the trial, reserving the right to offer additional testimony. The defendant specifically stated he was in agreement with this procedure. The transcript of Sgt. Shirley's testimony given in the hearing on motion to suppress was then received in evidence. Lois Sowards, who transcribed defendant's statement, was then examined and thoroughly cross-examined concerning

2. Judge Schoenlaub presided. Defendant was represented by two attorneys, but they were not the same attorneys who represented him at the hearing on the motion to suppress heard before Judge Yeaman.

the taking of the written statement and oral conversations that she heard between defendant and the patrolmen when she was present. Sgt. Shirley was also called for a brief interrogation. Defendant Hunter took the stand and testified in great detail concerning his various conversations with the patrolmen. At the close of his direct testimony, defendant's counsel invited him to make any statement to the court concerning matters that were not covered. The defendant also offered in evidence a transcript of a part of the testimony of Sgt. Shirley given at the preliminary hearing on October 2, 1968.

After hearing the arguments of counsel, the trial court expressed some concern as to the legal effect of the words used by Sgt. Shirley in the hearing on the motion to suppress and observed that that would be a matter for the Appellate Court.[3]

My colleagues are concerned because the Supreme Court of Missouri (*State* v. *Hunter*, 456 S.W.2d 314 at 321) and the United States District Court found there was no discussion of a "deal" on August 5, 1969, when appellant made and signed his statement. Taking the evidence

3. "THE COURT: I am concerned about the testimony of Sergeant Shirley that was found on page twenty-seven of the March 11 transcript. The legal effect of those words is a matter that will have to be determined by an appellate court, if this matter is appealed. Also, I do have considerable doubt because of that one point. I am going to overrule the objection. It is the finding of this Court that the defendant was adequately advised of his rights under the Constitution as shown by Plaintiff's Exhibits 2 and 4 and the testimony of Sergeant Shirley concerning the advice which he did give to the defendant. It is further the finding of this Court that the statements were voluntarily made by the defendant; that they were not procured by coercion or threats or through fear and were not induced by promises of leniency. The Court, therefore, finds that these statements in question are constitutionally admissible and competent evidence and, therefore, the defendant's objections are overruled and the statement, Plaintiff's Exhibit 3, is received in evidence, and the witness will be permitted to testify concerning the oral statements which the defendant also made." (the testimony of Sgt. Shirley is set out in Fn. 2 of the majority opinion.)

favorable to appellant, the most that can be said is that Sgt. Shirley advised appellant "* * * its possible that Mr. Lance [prosecutor] would consider a lesser charge if he [appellant] would cooperate." It is very difficult for me to read into these words a promise, express or implied, that leniency would be shown in exchange for a statement. When other factors are considered, including appellant's long criminal record[4] and his expressed antagonism toward prosecutor Lance in the early stages of the investigation, I find it impossible to conclude from this record that appellant's statements were involuntary or induced by promises of leniency. The most that can be said for appellant is that he was familiar with the criminal law and knew of his rights as well as the choices open to him. He wanted to make a deal, failing in this he could always claim he thought he had one, or do as he threatened, claim that he was not advised of his rights.[5]

I fail to see the value of another evidentiary hearing on the issue of voluntariness. This matter was originally gone into in the preliminary hearing on October 2, 1968. It was thoroughly ventilated in the hearing on the motion

---

4. Apparently four felony convictions in Kansas. Two in Missouri.

5. Sgt. Shirley testified during the trial:

"Q. Sergeant Shirley, you were present at the time this statement I read was made, is that correct?

A. Yes.

Q. You were asking at least some of the questions?

A. I asked the majority of them.

Q. What else, if anything, did Mr. Hunter say on that date?

A. Well, I asked Mr. Hunter what he thought would happen when this statement was signed and brought back, in the event that the Andrew County Prosecuting Attorney saw fit to file a charge of first-degree murder, and he stated to me at that time, as I related last night, practically the same thing. That he would state that I had not informed him of his rights and that he had not understood his rights and he said, 'They will believe me and not you,' and then again he reiterated the fact he had two witnesses, one of which was a reverend, that would attest to the fact he had stayed at his home that night, and again he said he would have himself declared mentally incompetent."

to suppress heard on March 11, 1969. Transcripts of the foregoing were available to appellant and his counsel at the time of the trial. Appellant stipulated that the transcript of Sgt. Shirley's testimony given in the hearing on the motion to suppress be made a part of the record on the issue of voluntariness. Sgt. Shirley was also available and did testify briefly, and was available for cross-examination by the defendant. A transcript of Sgt. Rhoades' testimony given during the hearing on the motion to suppress was likewise available to defendant and his counsel. Sgt. Rhoades had testified that he heard Sgt. Shirley say "its possible." On cross-examination he stated he thought this meant there might be some leniency shown to defendant by the Prosecuting Attorney if the defendant were to give a statement. He also volunteered that "its possible" may have related to the prosecuting attorney coming down to see the defendant. Neither side chose to call Sgt. Rhoades or use the transcript of his testimony. After the trial court's determination of voluntariness, appellant's statements were admitted. Thereafter, the jury was properly instructed that before the jury could consider an alleged statement of the defendant, oral or written, it must have been made voluntarily.

I am satisfied that appellant had a full hearing and that all of the relevant facts were developed under the guiding hand of counsel.[6] Proper findings, amply supported by the evidence, were made by the trial court. The Supreme Court of Missouri has affirmed the finding of voluntariness. I would affirm the district court's denial of the petition and its refusal to grant an evidentiary hearing herein.

A true copy

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

6. *Cf. Hawkins* v. *Bennett*, 423 F.2d 948 (8th Cir. 1970).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20,601

BERT LEROY HUNTER,
Appellant,
v.
HAROLD R. SWENSON, WARDEN,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Order

(Filed May 21, 1971)

The PETITION FOR REHEARING OR TRANSFER TO THE COURT EN BANC filed by the appellee on May 10, 1971, is hereby denied.

The opinion in this case which was filed on April 26, 1971 is hereby amended by striking from the last paragraph on page 9 of the slip opinion, the sentence "This state rule is even more rigid than the one adopted by the Supreme Court of the United States.", and inserting in its place "This Court, however, must apply the federal standard in cases such as this."

BY THE COURT

May 19, 1971